

Effective 5/13/2014

7-2-12 Powers of commissioner in possession -- Sale of assets -- Postpossession financing -- New deposit instruments -- Executory contracts -- Transfer of property -- Avoidance of transfers -- Avoidable preferences -- Setoff.

- (1) Upon taking possession of the institution, the commissioner may do all things necessary to preserve its assets and business, and shall rehabilitate, reorganize, or liquidate the affairs of the institution in a manner he determines to be in the best interests of the institution's depositors and creditors. Any such determination by the commissioner may not be overruled by a reviewing court unless it is found to be arbitrary, capricious, fraudulent, or contrary to law. In the event of a liquidation, he shall collect all debts due and claims belonging to it, and may compromise all bad or doubtful debts. He may sell, upon terms he may determine, any or all of the property of the institution for cash or other consideration. The commissioner shall give such notice as the court may direct to the institution of the time and place of hearing upon an application to the court for approval of the sale. The commissioner shall execute and deliver to the purchaser of any property of the institution sold by him those deeds or instruments necessary to evidence the passing of title.
- (2) With approval of the court and upon terms and with priority determined by the court, the commissioner may borrow money and issue evidence of indebtedness. To secure repayment of the indebtedness, he may mortgage, pledge, transfer in trust, or hypothecate any or all of the property of the institution superior to any charge on the property for expenses of the proceeding as provided in Section 7-2-14. These loans may be obtained for the purpose of facilitating liquidation, protecting or preserving the assets in the charge of the commissioner, expediting the making of distributions to depositors and other claimants, aiding in the reopening or reorganization of the institution or its merger or consolidation with another institution, or the sale of all of its assets. Neither the commissioner nor any special deputy or other person lawfully in charge of the affairs of the institution is under any personal obligation to repay those loans. The commissioner may take any action necessary or proper to consummate the loan and to provide for its repayment and to give bond when required for the faithful performance of all undertakings in connection with it. The commissioner or special deputy shall make application to the court for approval of any loan proposed under this section. Notice of hearing upon the application shall be given as the court directs. At the hearing upon the application any stockholder or shareholder of the institution or any depositor or other creditor of the institution may appear and be heard on the application. Prior to the obtaining of a court order, the commissioner or special deputy in charge of the affairs of the institution may make application or negotiate for the loan or loans subject to the obtaining of the court order.
- (3) With the approval of the court pursuant to a plan of reorganization or liquidation under Section 7-2-18, the commissioner may provide for depositors to receive new deposit instruments from a depository institution that purchases or receives some or all of the assets of the institution in the possession of the commissioner. All new deposit instruments issued by the acquiring depository institution may, in accordance with the terms of the plan of reorganization or liquidation, be subject to different amounts, terms, and interest rates than the original deposit instruments of the institution in the possession of the commissioner. All deposit instruments issued by the acquiring institution shall be considered new deposit obligations of the acquiring institution. The original deposit instruments issued by the institution in the possession of the commissioner are not liabilities of the acquiring institution, unless assumed by the acquiring institution. Unpaid claims of depositors against the institution in the possession of the commissioner continue, and may be provided for in the plan of reorganization or liquidation.

- (4) The commissioner, after taking possession of any institution or other person subject to the jurisdiction of the department, may terminate any executory contract, including standby letters of credit, unexpired leases and unexpired employment contracts, to which the institution or other person is a party. If the termination of an executory contract or unexpired lease constitutes a breach of the contract or lease, the date of the breach is the date on which the commissioner took possession of the institution. Claims for damages for breach of an executory contract shall be filed within 30 days of receipt of notice of the termination, and if allowed, shall be paid in the same manner as all other allowable claims of the same priority out of the assets of the institution available to pay claims.
- (5) With approval of the court and upon a showing by the commissioner that it is in the best interests of the depositors and creditors, the commissioner may transfer property on account of an indebtedness incurred by the institution prior to the date of the taking.
- (6)
 - (a) The commissioner may avoid any transfer of any interest of the institution in property or any obligation incurred by the institution that is void or voidable by a creditor under Title 25, Chapter 6, Uniform Fraudulent Transfer Act.
 - (b) The commissioner may avoid any transfer of any interest in real property of the institution that is void as against or voidable by a subsequent purchaser in good faith and for a valuable consideration of the same real property or any portion thereof who has duly recorded his conveyance at the time possession of the institution is taken, whether or not such a purchaser exists.
 - (c) The commissioner may avoid any transfer of any interest in property of the institution or any obligation incurred by the institution that is invalid or void as against, or is voidable by a creditor that extends credit to the institution at the time possession of the institution is taken by the commissioner, and that obtains, at such time and with respect to such credit, a judgment lien or a lien by attachment, levy, execution, garnishment, or other judicial lien on the property involved, whether or not such a creditor exists.
 - (d) The right of the commissioner under Subsections (6)(b) and (c) to avoid any transfer of any interest in property of the institution shall be unaffected by and without regard to any knowledge of the commissioner or of any creditor of the institution.
 - (e) "Transfer" means every mode, direct or indirect, absolute or conditional, voluntary or involuntary, or disposing of or parting with property or with an interest in property, including retention of title as a security interest.
 - (f) The commissioner may avoid and recover any payment or other transfer of any interest in property of the institution to or for the benefit of a creditor, for or on account of an antecedent debt owed by the institution before the transfer was made if the creditor at the time of such transfer had reasonable cause to believe that the institution was insolvent, and if the payment or other transfer will allow the creditor to obtain a greater percentage of his debt than he would be entitled to under the provisions of Section 7-2-15. For the purposes of this subsection:
 - (i) antecedent debt does not include earned wages and salaries and other operating expenses incurred and paid in the normal course of business;
 - (ii) a transfer of any interest in real property is deemed to have been made or suffered when it became so far perfected that a subsequent good faith purchaser of the property from the institution for a valuable consideration could not acquire an interest superior to the transferee; and
 - (iii) a transfer of property other than real property is deemed to have been made or suffered when it became so far perfected that a creditor on a simple contract could not acquire a lien

by attachment, levy, execution, garnishment, or other judicial lien superior to the interest of the transferee.

- (g) For purposes of this section, "date of possession" means the earlier of the date the commissioner takes possession of a financial institution under Title 7, Chapter 2, Possession of Depository Institution by Commissioner, or the date when the commissioner enters an order suspending payments to depositors and other creditors under Section 7-2-19.
- (7)
- (a) With or without the prior approval of the court, the commissioner or any federal deposit insurance agency appointed by him as receiver or liquidator of a depository institution closed by the commissioner under the provisions of this chapter may setoff against the deposits or other liabilities of the institution any debts or other obligations of the depositor or claimant due and owing to the institution. The amount of any setoff against the liabilities of the institution shall be no greater than the amount the depositor or claimant would receive pursuant to Section 7-2-15 after final liquidation of the institution. When the liquidation value of a depositor's or claimant's claim against the institution will or may be less than the full amount of the claim, setoff may be made prior to final liquidation if the commissioner or any receiver or liquidator appointed by him can reasonably estimate the liquidation value of the claim, and the court, after notice and opportunity for hearing, approves the estimate for purposes of making the setoff. If the right of setoff is exercised, the commissioner or any receiver or liquidator appointed by him shall give written notice to the depositor or claimant of the amount setoff.
- (b) The existence and amount of a debtor or creditor relationship or both, between the institution and its depositor or claimant and the right to the proceeds in a deposit account shall be determined solely by the books and records of the institution.
- (c) Any contract purporting to affect the right of setoff shall be in writing and signed by the depositor-debtor and an authorized officer of the institution and be maintained as a part of the records of the institution.
- (d) Any claim that a deposit account is a special account not subject to setoff because it was maintained for a specific purpose or to satisfy a particular obligation other than satisfaction of or as security for an indebtedness to the institution or that the right to the deposit actually belongs to a third party does not affect the right to setoff of the commissioner or any receiver or liquidator appointed by him unless the special nature of the account is clearly shown in the books and records of the institution.
- (e) In the absence of any other instrument in writing, the terms and provisions of the signature card applicable to a particular account in effect at the time the commissioner takes possession of the institution shall be determinative of the right of setoff by the commissioner or any receiver or liquidator appointed by him.
- (f) Knowledge of the institution or of any director, officer, or employee of the institution that the nature of the account is other than as shown in the books and records of the institution does not affect the right of setoff by the commissioner or any receiver or liquidator appointed by him.
- (g) The liability of the commissioner or any receiver or liquidator appointed by him for exercising a right of setoff other than as authorized by this section shall be only to a person who establishes by the procedure set forth in Section 7-2-6 that his interest in the account is superior to that of the person whose debt to the institution was setoff against the account. The amount of any such liability shall be no greater than the amount of the setoff and neither the commissioner or any receiver or liquidator appointed by him shall be liable for any action

taken under this section unless the action taken is determined by the court to be arbitrary or capricious.

Amended by Chapter 189, 2014 General Session